IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 466

SECURITIES AND EXCHANGE COMMISSION,
Petitioner,

versus

LOUISIANA PUBLIC SERVICE COMMISSION,
MIDDLE SOUTH UTILITIES, INC., and
LOUISIANA POWER & LIGHT COMPANY,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF OF LOUISIANA PUBLIC SERVICE COMMISSION, RESPONDENT.

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OPINIONS BELOW.

The opinion of the Court of Appeals (R. 134) is officially reported at 235 F. (2d) 167. The Securities and Exchange Commission findings and opinions are unreported; that of September 13, 1955 is found at R. 129, and of March 20, 1953 at R. 103.

JURISDICTION.

Jurisdiction of this Court is invoked under 28 U. S. C. 1254(1); writ of certiorari having been granted on December 3, 1956 (R. 144) to the U. S. Court of Appeals (5th Circuit) decision of June 30, 1956 (R. 134).

QUESTIONS PRESENTED.

1. Whether judicial review shall be permitted of an order of the Securities and Exchange Commission denying a petition of the Louisiana Public Service Commission seeking to revoke or modify a prior S. E. C. order which directed a public utility to dispose of ownership of its non-electric properties under the provisions of the Public Utility Holding Company Act,

a) Where the provisions of Section 11 (b) of the Act authorized the S. E. C. by order to revoke or modify any order previously made if "it finds that the conditions upon which the order was predicated do not exist",

b) Where Section 11 (b) also provides that "Any order made under this subsection shall be subject to judicial review as provided in Section 24", and

c) Where the Louisiana Public Service Commission, a State regulatory body, petitioned the S. E. C. for revocation or modification, alleging that the conditions at the time of and subsequent to the prior S. E. C. order do not exist, and has sought judicial review of the S. E. C. order refusing to revoke or modify its prior order.

2. a) Whether the "loss of substantial economies", referred to in Section 11 (b) (1) (A) of the Act, and necessary to permit a registered holding company to continue to control one or more additional integrated public utility systems, refers solely to the additional systems or to the principal system as well.

b) Whether the "loss of substantial economies" must cause such serious economic impairment to the public utility systems to be divested as to render them incapable of independent economical operation.

STATUTE INVOLVED.

The Public Utility Holding Company Act of 1935, and Sections 11 (b) and 24 (a) thereof. (15 U. S. C. 79k (b) and 79x (a)).

STATEMENT.

This case involves the petition of the Securities and Exchange Commission to review the decision of the U. S. Court of Appeals for the Fifth Circuit, decided June 30, 1956, which remanded this proceeding to the S. E. C. for further consideration consistent with the opinion of the

Court (R. 142). The matter first reached the courts on the petition for review filed by the Louisiana Public Service Commission under the provisions of Sections 11 (b) and 24 (a) of the Public Utility Holding Company Act. The Louisiana Commission is an official agency of the State of Louisiana, provided for by the State Constitution[1] and statutes,[2] with all necessary power and authority to regulate both electric and gas utility companies operating in Louisiana. It is composed of three commissioners, who are

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[1] Article 6, p. 4, Constitution of 1921, provides:

"P. 4. Powers and duties of Service Commission.—The Commission shall have and exercise all necessary power and authority to supervise, govern, regulate and control all common carrier railroads, street railroads, interurban railroads, steamboats and other water craft, sleeping car, express, telephone, telegraph, gas, electric light, heat and power, water works, common carrier pipe lines, canals (except irrigation canals) and other public utilities in the State of Louisiana, and to fix reasonable and just single and joint line rates, fares, tolls and charges for the commodities furnished, or services rendered by such common carriers or public utilities, except as herein otherwise provided.

"The power, authority, and duties of the Commission shall affect and include all matters and things connected with, concerning, and growing out of the service to be given or rendered by the common carriers and public utilities hereby, or which may hereafter be made subject to supervision, regulation and control by the Commission. The right of the Legislature to place other public utilities under the control of and confer other powers upon the Louisiana Public Service Commission respecting common carriers and public utilities is hereby declared to be unlimited by any provision of this Constitution.

"The said Commission shall have power to adopt and enforce such reasonable rules, regulations, and modes of procedure as it may deem proper for the discharge of its duties, and it may summon and compel the attendance of witnesses, swear witnesses, compel the production of books and papers, take testimony under commission, and punish for contempt as fully as is provided by law for the district courts."

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[2] Louisiana Revised Statutes, 1950, Title 45, section 1161 et seq.

elected from the three public service districts of Louisiana for six-year overlapping terms.[3]

The S. E. C. here is seeking and has ordered divestiture by Louisiana Power and Light Company of its non-electric properties, consisting principally of gas properties. The matter, therefore, involves a conflict between two governmental regulatory agencies, the Securities and Exchange Commission on the one hand, and the Louisiana Public Service Commission on the other. The federal agency, the S. E. C., is attempting to accomplish what it has set up to be the objectives of the Public Utility Holding Company Act in this case; the state agency, the Louisiana Commission, is attempting to save the rate payers of a large public utility company in Louisiana, operating wholly within that State, from additional costs of nearly one million dollars a year, which would result if Louisiana Power's electric and gas systems were separated and the gas properties disposed of to a new company.

The Louisiana Commission's position in this case is based on the Section 11 (b) (1) (A) (B) (C) provisions of the Public Utility Holding Company Act, which provide the conditions under which a registered holding com-

[3] Article 6, p. 3, Constitution of 1921, provides in part as follows:

"P. 3. Public Service Commission—Election—Salary and traveling expenses.—There is hereby created a Commission, to be known as the Louisiana Public Service Commission, which shall be composed of three members, who shall be duly qualified electors, to be elected from the district hereinafter named, at the time fixed for the Congressional elections. . .

"The three members of the Railroad Commission of Louisiana in office upon the adoption of this Constitution shall be the members of the Louisiana Public Service Commission and shall serve out the terms for which they were respectively chosen. Upon the expiration of the term of each commissioner his successor shall be chosen for a term of six years."

pany may continue to control one or more additional integrated public utility systems.

The chronological sequence of events follows:

On January 29, 1953 the S. E. C. issued its notice convening a hearing pursuant to Section 11 (b) (1) of the Act to decide, among other things, "Whether Middle South and Louisiana should be required to take action to dispose of the gas utility assets and non-utility assets of Louisiana and, if so, what terms and conditions should be imposed in connection therewith." (R. 106). The order directed that the hearing be convened on February 19, 1953. Accordingly a hearing was held on February 19 and 20, 1953, approximately three weeks after the date of the notice.[4]

On March 20, 1953, the S. E. C. issued its order under the provisions of Section 11 (b) of the Act, directing Louisiana Power to dispose of its non-electric properties, consisting primarily of gas properties. In its order, the S. E. C. held that, "The general framework of the Act as well as its legislative history demonstrates the intention of permitting the retention of additional systems only where such additional system is so small that it could not operate economically under separate management" (R. 116). Also, "For the loss of economies to be 'substantial' they must

[4] Earlier, on March 7, 1949, the S. E. C. had issued its order under Section 11(e) of the Act, approving a plan for the dissolution of Electric Power and Light Corporation, a registered holding company, under which a new holding company, Middle South, was created which acquired the common stocks of several public utilities, including Louisiana Power (R. 104, 105). Jurisdiction was reserved at that time to make definitive findings under Section 11 of the Act with respect to the retainability of the non-electric properties, and to institute and conduct such further proceedings under Section 11 (b) of the Act as might be necessary or appropriate (R. 105).

be 'important' in the sense that they are of such magnitude as to cause a serious economic impairment of the system." (R. 117).

Finally in its order, the S. E. C. released jurisdiction with respect to the Section 11 problems of Middle South, and retained jurisdiction only to carry out the terms of the order (R. 128).

On June 16, 1953, the Louisiana Commission issued a general order prohibiting public utility companies under its jurisdiction from disposing of utility properties subject to its jurisdiction without its consent.[5]

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[5] Offer of Proof, Exhibit K (R. 44, 45). The Louisiana Commission general order reads as follows:

"At a session of the Louisiana Public Service Commission held at its offices in Baton Rouge, Louisiana, on June 9, 1953, certain questions arose as to the degree of control which this Commission should exercise over sales, leases, mergers, consolidations, and changes of control of public utilities subject to its jurisdiction.

"The Commission having been vested by the Constitution of 1921 with all necessary power and authority, among other things, to supervise, govern, regulate and control all street railroads, telephone, telegraph, gas, electric light and power, water works, and common carrier pipe lines, hereby recognizes the present ownership of every such public utility now coming under its jurisdiction in accordance with annual reports on file with this Commission for the year ended December 31, 1952, or for such fiscal year ended in 1952 as may be applicable.

"The attention of the Commission has been called to the fact that utility systems have, in the past, been sold or otherwise effected change of ownership or control without authority and without the knowledge of the Commission or any member of its staff until after such sale or change of ownership has been consummated, and it is hereby:

"Ordered, that from the date of this order, the sale, lease, merger, consolidation, or other change in the ownership of the assets of public utilities or any controlling part thereof subject to the jurisdiction of the Commission is hereby prohibited without first having obtained an order of authority from the Commission for such change in ownership."

On November 10, 1954, Louisiana Power and Louisiana Gas Service Corporation filed a joint application-declaration with the S. E. C., proposing that the newly-incorporated gas service corporation acquire all the non-electric properties of Louisiana Power. Simultaneously therewith a similar application was filed by Louisiana Power and Louisiana Gas with the Louisiana Public Service Commission.

On December 22, 1954, the Louisiana Commission telegraphed the Secretary of the S. E. C., requesting that a public hearing be ordered in the matter of the Louisiana Power and Louisiana Gas joint application, and that the original case, on which the order of March 20, 1953 was predicated and which ordered Louisiana Power to divest itself of its non-electric properties, be reopened and set for further hearing at the same time for the purpose of receiving additional evidence (R. 89).

On December 27, 1954, the Louisiana Commission filed its petition dated December 23, 1954 with the S. E. C. in which it alleged that the hearing heretofore held in the matter, "did not elicit the existing facts and information which would have demonstrated that the indicated divestiture of gas properties by Louisiana Power & Light Company is not in the public interest; that the retention of these gas properties by Louisiana Power & Light Company would bring about substantial economies of such a nature as to justify the retention of such properties; that the separation of such properties would lead to increased cost of gas to the consumers of gas in the State of Louisiana and should not be consummated; and that an opportunity should be afforded petitioner by the reopening of these matters and the record therein for the reception of further

evidence on the questions therein involved and relating to Louisiana Power & Light Company." (See Louisiana Commission's petition, R. 91).

On January 3, 1955, the Louisiana Commission filed a supplemental petition with the S. E. C., reiterating the allegations of its original petition and averring that since the final hearings (which were the subject of the S. E. C. order of March 20, 1953), "there have occurred substantial and important changes in the conditions and facts upon which the findings and order of this Honorable Commission were predicated in said proceedings, of such a character as, in petitioner's opinion, would have led this Honorable Commission to reach a different and contrary conclusion in these proceedings with regard to the divestiture by Louisiana Power & Light Company of its gas properties, and petitioner respectfully suggests that in the public interest evidence of such changes should be resolved and considered." (R. 92, 93).

Attached to the supplemental petition was a letter from the President of Louisiana Power advising that the company had no objection to the reopening of the proceedings (R. 93, 94).

On January 21, 1955, the S. E. C. addressed a letter to the Secretary of the Louisiana Public Service Commission which acknowledged receipt of the petition for reopening and reconsideration of its 1953 order of divestment directed against Louisiana Power. The letter stated that the Commission would entertain an offer of proof and brief; and that the offer should set out in reasonable detail the facts the Louisiana Commission would seek to prove to establish changed circumstances supporting a modification of the order and any other facts which the Louisiana

Commission deemed relevant and would seek to establish. The letter said that, "In the brief you can submit your arguments for reopening the record." (R. 95).

The S. E. C. then issued its notice on May 16, 1955, stating the situation with respect to the background of the case and the position of the Louisiana Commission, setting forth a description of the material filed by the Louisiana Commission in support of its position, and inviting Middle South and Louisiana Power and any other interested person to file statements in support of or in opposition to the position of the Louisiana Commission. It likewise set a date for oral argument before the S. E. C. (R. 96-102).[6]

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[6] The S. E. C. notice said that the pertinent portions of the Louisiana Commission's Offer of Proof and Exhibits could be summarized in part as follows:

"The offer of proof outlines six general matters which Public Service Commission would propose to establish at a public hearing in these proceedings. These six items are concerned primarily with the following considerations: (i) on the basis of a separation study of Louisiana Power for the year 1954 prepared by the members of the staff of Public Service Commission which allegedly '. . . shows that the total additional cost of such separation to Louisiana (Power's) utility customers would be $957,000 of which $684,337 would be additional cost to Louisiana (Power's) electric customers, (and) $272,816 would represent additional cost to the non-electric customers,' the gas system of Louisiana Power cannot be operated as an independent system without the loss of substantial economies; (ii) the electric and gas systems of Louisiana Power are located entirely within the State of Louisiana; (iii) the continued combination of such systems will not impair the advantages of localized management, efficient operation or the effectiveness of regulation; (iv) no law of the State of Louisiana prohibits the joint ownership or operation of gas and electric utility assets; (v) the public interest and the interest of consumers will best be served by the continued joint operation by Louisiana Power of gas and electric utility assets, and (vi) it is the desire of all governmental agencies of the territory served by Louisiana Power (except Jefferson Parish) that the joint operation of these properties by Louisiana Power be continued."

THE OFFER OF PROOF.

In its Offer of Proof the Louisiana Commission stated that it had heretofore exercised jurisdiction over all the retail electric rates and gas rates of Louisiana Power & Light Company for residential, commercial, industrial and governmental and municipal services; that all such rates are on file with the Commission; and that the Commission requires Louisiana and other utilities to file annual reports which show among other things the earnings for each year. It further stated that by its order dated July 29, 1946 it had fixed the electric rate base of Louisiana Power and had prescribed its allowable rate of return; that Louisiana's electric accounts are classified in accordance with the uniform system of accounts prescribed by the Commission and its gas accounts are classified in accordance with the N. A. R. U. C. system of accounts (R. 4, 5).

The Louisiana Commission further stated that the gas system of Louisiana Power cannot be operated as an independent system without the loss of substantial economies which can be secured by the retention of such system; that the electric and gas systems of Louisiana Power are located entirely within the State of Louisiana; that the continued combination of such systems under the control of the holding company is not so large considering the state of the art and the area or region affected as to impair the advantages of localized management, efficient operation, or the effectiveness of regulation; that no law of the State of Louisiana prohibits the ownership or operation by a single company of utility assets of an electric utility and a gas utility, and that Louisiana Power has the express approval of the Louisiana Commission to con-

tinue operation of both utility systems; that the public interest and the interests of electric and gas consumers of Louisiana would best be served by the continued operation of both systems by Louisiana Power; and that it is the desire of the official governmental agencies in Louisiana concerned with the services which Louisiana Power renders that the company retain both electric and gas systems (R. 5). Attached to the Offer of Proof were numerous exhibits which were prepared "as a result of a great deal of time spent by its (the Commission) staff." (R. 6). The Louisiana Commission averred that its study showed that the total additional cost of such separation to Louisiana Power's utility customers would be $957,193 of which $684,377 would be additional cost to Louisiana Power's electric customers, and $272,816 would represent additional cost to the non-electric customers. This separation study was made by taking the operations of the company for the year 1954 and eliminating from the cost of operation of the electric properties all the expenses which could possibly be eliminated during that year if the gas operations had been eliminated (R. 6). This showed the increased cost which the electric operations would have to bear. The second part of the study projected the cost of operations of a separately operated gas system. This was compared with costs actually charged to gas operations during the year.

The Louisiana Commission further pointed out that debt financing would be much more expensive for a separate gas company; that sales of natural gas are subject to great seasonal variations as are sales of electric energy; that comparing these sales it will be seen from the exhibits that the two systems operated together tend to

complement each other, which makes for a more balanced operation, and from a rate regulation point of view eliminates the necessity for the Commission giving consideration to such seasonal variations in fixing a rate of return. (R. 8, 9.)

The Louisiana Commission said that its long experience in regulating Louisiana Power has indicated, "that it is an efficient operation", and that the Commission "believes that severance of the gas properties would not improve but would impair this efficient operation;" that the Commission "has found that regulation of Louisiana in its joint operations has been very effective. Electric and gas rate reductions were put into effect on numerous occasions. No increase in electric rates has ever been granted to, or ever sought by, Louisiana, although the only other comparable electric utility company in the State has been required to effect a material general rate increase. No general gas rate increase has been put into effect by Louisiana, and the only gas rate increases granted to Louisiana have been in the exact amount of the increase in the cost of the gas purchased for resale by Louisiana." (R. 11, 12). The Louisiana Commission averred that other utilities under its jurisdiction continue to operate both electric and gas systems; that it has not found that this combined operation in any way impaired the effectiveness of the Commission's regulation of these utilities (R. 12).

Exhibits A-I, inclusive, attached to the Offer of Proof, contained detailed analyses and cost studies made by the Louisiana Commission's staff, showing in every particular the basis upon which it alleged that total annual additional costs to Louisiana Power utility customers would amount to almost one million dollars (R. 16-42).

Attached to the Offer of Proof were letters showing the opposition to the proposed separation of the electric and gas systems of the principal governmental officials of Louisiana, including the governor of the State, officials of twenty-eight of the thirty towns and communities served, and fourteen of the fifteen parishes (counties) served by Louisiana Power (R. 45-49).

On July 7, 1955, a five-hour oral argument occurred before the S. E. C. in Washington, in which the Louisiana Commission's Offer of Proof was discussed in detail, as well as applicable authorities, by counsel for the Louisiana Commission, Louisiana Power, Middle South, and the S. E. C. Thereafter, the S. E. C. issued its order of September 13, 1955, in which it said it had considered the Louisiana Commission's Offer of Proof and the arguments relating thereto, but was of the opinion that no grounds for questioning its earlier conclusion and no changed circumstances justifying a modification of its order had been indicated. Accordingly, it declined to reopen the proceedings on which its order of March 20, 1953 was entered (R. 132).

Exercising its right under the provisions of Section 11 (b) and Section 24 (a) of the Act, the Louisiana Commission filed its petition with the U. S. Court of Appeals for the Fifth Circuit seeking a review of the S. E. C. order of September 13, 1955, and asking that said order be set aside as well as the order of March 20, 1953 (R. 63-67).

On June 30, 1956, after the usual briefs and oral argument, the Court of Appeals remanded the case to the

S. E. C. for further proceedings, having granted the Louisiana Commission's petition for review.

ARGUMENT.

Under the Constitution of Louisiana, the Louisiana Public Service Commission is vested with all necessary power and authority to supervise, regulate and control all public utilities, including gas and electric light companies. The Constitution makes it the duty of the Commission to concern itself with all matters and things concerning and growing out of the service to be given or rendered by public utilities. This regulatory authority has been exercised by the Louisiana Commission for many years, the present Commission having derived its authority from the 1921 Louisiana Constitution. The Louisiana Commission, therefore, has had broad experience at the state level in regulating the state's electric and gas utilities. It has intimate knowledge of the manner in which most public utilities in the State operate, and it is naturally concerned with the rates which are to be paid by consumers in Louisiana. Public utilities are entitled to a fair rate of return, and naturally their costs of operation are most important considerations in determining what their regulated income shall be and what rate of return shall be allowed by the Commission on their operations, as well as what the rates shall be to consumers and users of the service.

The Louisiana Commission's concern with the activities of Louisiana Power is one which it has the constitutional duty to perform, namely to keep rates to consumers in Louisiana of this company at a fair and just level.

As the Louisiana Commission said in its Offer of Proof, it has had long experience in regulating Louisiana Power, which it believes to be an efficient operation. Louisiana Power operates solely within the State of Louisiana, and the Louisiana Commission believes that separation of the gas properties from the electric properties would not improve but would impair this efficient operation. The Louisiana Commission was aware that there is no law in Louisiana which prohibits the ownership or operation by a single company of utility assets of both an electric and gas utility. Realizing, as it did, that Louisiana Power had never sought an increase in electric rates and no general gas rate increase except to the extent of increased costs of gas purchased for resale, and knowing that other public utilities under its jurisdiction continue to operate both electric and gas systems, it felt comtinue to operate both electric and gas systems, it felt that the proposed divestiture should not occur.

When the S. E. C. declined to permit the Louisiana Commission to present the results of its comprehensive study forming the subject of its Offer of Proof, the Louisiana Commission appealed to the courts in its official capacity on behalf of the numerous consumers and ratepayers in Louisiana. The Louisiana Commission believes that it is wholly unnecessary for the S. E. C. to require the divestiture of the gas properties by Louisiana Power, particularly when, in the belief of the Louisiana Commission these gas properties may clearly and properly be retained under the provisions of Section 11 (b) (1) (A) (B) (C). The frequent reference to the need of protecting "consumers" in the Public Utility Holding Company Act discloses also that Congress in passing the Act itself felt a

great necessity and obligation to look out for the interests of the consumers of the numerous public utilities in the nation. The Court will find numerous references in the Act to "the interest of consumers of electric energy and natural and manufactured gas". (*E. g.*, Sec. 1 (b)).

I.

Judicial Review Is Expressly Provided for Any Order of the S. E. C. Made Under Subsection 11 (b) of the Act. The S. E. C. Denial of the Louisiana Commission's Petition, Filed Under Subsection 11 (b) To Revoke or Modify Its Previous Order Requiring Louisiana Power to Divest Itself of Its Non-Electric Properties on the Ground That the Conditions Upon Which the Order Was Predicated Do Not Exist, Is, Therefore, Expressly Subject to Judicial Review.

In the Act judicial review is provided for by Section 24 (a), entitled, "Court Review of Orders". This section states that "Any person or party aggrieved by an order issued by the Commission under this title may obtain a review of such order in a Circuit Court of Appeals of the United States. . . ." Thus an order issued by the Commission is subject to court review if the order is issued by the S. E. C. under the provisions of the Act. But Section 11 (b) restates the right of judicial review by repeating it in said section, though we may infer that mention of the right of judicial review in Section 11 (b) is unnecessary, since judicial review generally is provided for to orders of the S. E. C. by Section 24 (a). It is proper to construe the repetition of the right of judicial review which Congress placed in Section 11 (b) to mean that the right of judicial review has been emphasized, as if to say, that it may not be taken away from a person aggrieved by

an order issued by the S. E. C. under Section 11 (b). Consider the last two sentences of Section 11 (b), which read:

> **"The Commission may by order revoke or modify any order previously made under this subsection, if, after notice and opportunity for hearing, it finds that the conditions upon which the order was predicated do not exist. Any order made under this subsection shall be subject to judicial review as provided in Section 24."** (Emphasis supplied).

It is noteworthy that the sentence providing for the right to appeal to the courts immediately follows the sentence which authorizes the Commission to revoke or modify any order previously made. Congress could not have been more emphatic or lucid in stating the right of the Louisiana Commission to judicial review of an order of the Commission which declined to revoke or modify an order previously made, where the conditions upon which the order was predicated do not exist.

There is no other section in the Act which expressly provides for judicial review of an order of the S. E. C. Only Section 11 (b) contains such a provision and expressly mentions the right of judicial review in addition to that which is already provided generally under Section 24 (a). Thus, of the thirty-three sections in the Act, only Section 11 (b) has been so singled out. It can not be logically argued by the S. E. C. (brief, p. 27) that its orders may be modified only at its discretion. The language of the next following sentence of the subsection quoted

above is too clear that the right of judicial review is preserved to believe that Congress intended any such result. If it meant the S. E. C.'s discretion to be plenary and final, it would not have included the next following sentence which provides for judicial review of orders of the S. E. C. There are numerous subsections in the Act in which the S. E. C. is required to take action by order where no specific right of judicial review is spelled out but an aggrieved party is relegated to the general review provisions of Section 24 (a). (See Sec. 2 (3) (7), Sec. 8 (13)). In no other portion of the Act is the right of judicial review so clearly stated as it is in Section 11 (b), where the right to seek judicial review is expressly reserved to a party aggrieved by the action of the S. E. C. under this subsection.

Section 11 (b) contains the so-called "death sentence" provisions of the Act. The importance of the section and the drastic effects which flow from its application were well-known to Congress. We can only infer, therefore, that Congress desired that parties aggrieved by S. E. C. action under the Section should certainly have the right of judicial review. So that right was expressly stated in Section 11 (b) that there would be no misunderstanding of the legislative intent.

The S. E. C. contends (brief, p. 18) that revocation or modification can only occur, "in the light of changed circumstances". But this interpretation is based entirely on prior decisions of the S. E. C. itself and not on

judicial authority. It contends that the clause, "conditions upon which the order was predicated do not exist" does not relate to conditions at the time the order was made.

The Louisiana Commission's position is that the clause means that the conditions referred to may be either those which exist now or which existed at the time the original order was made; that the "conditions upon which order was predicated do not exist" now nor did they exist when the order was made. Had the S. E. C. not based its original order upon erroneous legal interpretations an entirely different result might have occurred when the earlier order was issued. But the Louisiana Commission's argument and its offer of proof and supporting brief relate both to conditions **at the time of and subsequent to** the March 20, 1953 order of the S. E. C.

In the Louisiana Commission brief in support of its offer of proof, it said that, "Failure to take into consideration also the loss of economies in the principal electric system constitutes a shutting of one's eyes to reality". (R. 56). In its supplemental petition the Louisiana Commission alleged that, "there have occurred substantial and important changes in the conditions and facts upon which the findings and order" of the S. E. C. were predicated. (R. 92).

The Court below held that the provisions of Subsection 11 (b) were subject to the interpretation that, "if in fact, it can be shown that the conditions on which the order

was predicated were not truly the actual conditions, then a modification may be sought and obtained".[7] (R. 138).

In a footnote to its opinion the Court below cited *American Power Co. v. S. E. C.*, 329 U. S. 90, at p. 121, which it said contains language which seems to indicate that the S. E. C. interpretation is erroneous. In the *American Power Co.* case this Court said:

> "Moreover, a § 11 (b) (2) proceeding leads only to the expression of the Commission's view of what must be done to ensure compliance with the statu-

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[7] See the Court of Appeals opinion, R. 137, 138, as follows:

"We think the order of September 19 is reviewable. The order here involved is not of the type dealt with in Wayne United Gas Co. v. Owens-Illinois Glass Co., 300 U. S. 131, but is an order based on a procedure specifically authorized by Sec. 79k (b) of the statute. This provision was availed of by the petitioner here by requesting that the record be reopened. The fact that the Securities and Exchange Commission considered the petition, suggested that petitioner file an offer of proof, considered the proof thus offered, and made a specific finding that 'no grounds for questioning our earlier conclusion * * * have been indicated' demonstrates that the Commission considered this procedure as a petition to modify the earlier order. The order denying this request is expressly reviewable.

"The Commission contends that the power to revoke or modify upon a finding that the conditions upon which the order was predicated do not exist comes into play only if a change in conditions has occurred after the entry of the earlier order. The action of the Securities and Exchange Commission here indicates that it considered that it had the duty to consider the proof that related to the conditions that existed as of the time the earlier order was entered. The language of the statute does not precisely state whether the utility can ask for a modification of the earlier order by a subsequent showing that the facts were not as they were taken to be when the order was issued or whether a modification can be had only upon a showing that conditions have changed subsequent to the earlier order. The language is susceptible of the construction, however, that if, in fact, it can be shown that the conditions on which the order was predicated were not truly the actual conditions, then a modification may be sought and obtained. We hold that such modification may be based on the facts as they existed at the time of the order which is to be modified."

tory standards. Actual compliance comes later. In the meantime, nothing precludes American or Electric from seeking revocation of the dissolution orders on a showing that the conditions upon which the orders were predicated do not exist, thereby making some other type of order more appropriate. Section 11 (b) expressly envisages such a procedure, with provision for notice and hearing. American and Electric thus are not yet foreclosed from attacking the Commission's orders under § 11 (b) (2)."

This Court made no finding in the *American Power Co.* case that there must be a change in conditions to justify a revocation or modification of its prior order.

It is straining the language of the last sentence of Sec. 11 (b) to contend as the S. E. C. does here (brief, p. 31) that the S. E. C. order of September 13, 1955 is not such an order as is contemplated for judicial review under the subsection. It was on the suggestion of the S. E. C. that the Louisiana Commission filed a detailed offer of proof and accompanying brief; subsequently lengthy oral argument before the S. E. C. occurred. The S. E. C. treated the Louisiana Commission's petition, supplemental petition, offer of proof and brief as a request for modification of its prior order and for reopening of the proceeding. When it handed down its findings and opinion on September 13, 1955, it entitled them, "Reopening of Proceedings" and "Modification of Prior Order". (R. 129). Attached to its findings, bearing the same date, September 13, 1955, was an order described as, "Order Denying Petition to Reopen Prior Proceedings and Modify Order". (R. 133).

Surely the S. E. C. believed that it had made an **order** on September 13, 1955, and it was an **order** made only after detailed reconsideration of its findings and opinion, with a complete analysis of the offer of proof but with stout adherence to the erroneous interpretations of the Public Utility Holding Company Act, with which the Court below found it to be in error. The Court below found that the **order** denying the request for modification of the earlier order is expressly reviewable. (R. 138). See also these cases which support the lower court's view: *Todd v. S. E. C.*, 137 F. (2d) 475, (C. A., 6th Cir., 1943), and *Protective Committee v. S. E. C.*, 184 F. (2d) 646, (C. A., 2nd Cir., 1950).[8]

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[8] In those instances where a forum considers a motion for a new trial, an application for rehearing or a pleading for reconsideration, on its merits, such consideration extends and enlarges the period for appeal, even though the motion, application, etc. be made untimely. This holding is found in Bowman v. Loperena, et al., 311 U. S. 262, 61 S. Ct. 201 (1940), where the Court said:

"Treating the petition of September 10, 1936, and the motion of October 14, 1936, as petitions for rehearing of the order of adjudication, and the petition of November 15, 1937, as a second petition for rehearing filed out of time, the endorsement upon the latter by a judge of the court, and the hearing held and opinion announced upon it, show that it was entertained by the court and dealt with upon its merits. Until the order of February 17, 1938, no final decision was rendered sustaining the adjudication as against the debtor's attack.

"These circumstances enlarged the time for taking appeal from the order of adjudication. The filing of an untimely petition for rehearing which is not entertained or considered on its merits, or a motion for leave to file such a petition out of time, if not acted on or if denied by the trial court, cannot operate to extend the time for appeal. **But where the court allows the filing and, after considering the merits, denies the petition, the judgment of the court as originally entered does not become final until such denial, and the time for appeal runs from the date thereof.**" (Citing cases.) (Emphasis added.)

To the same effect: Pfister v. Northern Illinois Finance Corp., 317 U. S. 144, 63 S. Ct. 133 (1942); Babler v. United States, 137 F. (2d) 98 (C. A., 8th Cir., 1943); Denholm & McKay Co. v. Commissioner of Internal Revenue, 132 F. (2d) 243, (C. A., 1st Cir., 1942).

II.

The "Loss of Substantial Economies" Criterion Provided for in Sec. 11 (b) (1) (A) of the Act and Necessary to Permit a Registered Holding Company to Control One or More Additional Public Utility Systems Means, (a) Loss of Economies to the Principal System as Well as to the Additional Systems; (b) Such "Loss of Substantial Economies" is a Relative and Elastic Term and Does Not Mean That There Must Be Such Serious Economic Impairment to the Systems Involved as to Prevent Their Efficient Operation Under Separate Ownership.

In its earlier order of March 20, 1953, the S. E. C. said, "We have previously held that the loss in economies which may be considered under Clause A of Sec. 11 (b) (1), are limited to those directly related to the additional system sought to be retained and not to the principal system. . . ." (R. 118). In its later order of September 13, 1955, the S. E. C. said, "We there pointed out that under Sec. 11 (b) (1), Louisiana Power could retain its gas operations only if they were so small that they could not operate economically under separate management, and we found that it was clear that the Louisiana Power's gas properties are capable of effective and economical operation as a separate entity." (R. 132). But the language of the Act does not support the S. E. C. interpretation. The terms of the statute are not so limited. Compare Clause (A), Sec. 11 (b) (1), which reads as follows: "Each of such additional systems cannot be operated as an independent system without the loss of substantial economies which can be secured by the retention of control by such holding company of such system". The clause does not state that the loss of substantial economies must be to the

additional system only, but refers in general terms to the "loss of substantial economies" itself. Whether by the parent system or the additional system is immaterial for the clause refers to the "loss" which would be saved by the retention of control by the holding company of the additional systems. So if there is a loss of substantial economies either to the additional utility or to its principal company, or both, the requirements of Clause A are satisfied. The Court below so held, and in its opinion it said (R. 139, 140):

> "We think that the language of a statute should be construed, if possible, by taking the usual intendment of the words without reference to such aids to construction as the legislative history, which may be helpful only if the language itself is not clear.
>
> "Giving to the language of Sec. 79k (b) the meaning normally attributed to the words used, we think it quite clear that if, in fact, there is a loss of substantial economies either to the separated utility or to the parent company, then the proviso in clause A is satisfied, for in such event it is clear that 'each of such additional systems (here the gas system) cannot be operated without the loss of substantial economies (to the parent company) which can be secured by the retention of control by such holding company of such system.' Since the term 'loss of substantial economies' is not expressly restricted in the statute to the economies relating to the operation of the additional companies, but is in terms broad enough to include the loss of substantial economies to the holding company as well,

it would require judicial legislation for the court to cut it down as contended for by the Securities and Exchange Commission."

The Legislative history cited by the S. E. C. in its brief (p. 39) is not conclusive. It is important that we do not forget the language employed in the statute itself, which is the foremost guide to legislative intention. *U. S. v. American Trucking Associations*, 310 U. S. 534, 543 n. 18; *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U. S. 384, 390-5.[9]

The S. E. C. has cited in its brief (p. 43) *North American Co. v. S. E. C.*, 327 U. S. 686, at 696-697, in support of its theory and interpretation that the loss of economies relates only to the additional system and not to the principal system as well. But a careful reading of the cited language does not support its view. The quotation from the opinion is merely a paraphrase of the provisions of Section 11 (b) (1) (A) (B) (C). The opinion of the Court below in the instant case is founded on these same sub-sections, and the holding is based on the interpretation of Clause (A) that the loss of substantial economies relates both to the principal and the additional utility systems.

The S. E. C. cites the *Philadelphia Co.* case, 177 F. (2d) 720, 724 (C. A., D. C.) as supporting the proposition that the losses to be considered must relate solely to the

[9] In U. S. v. American Trucking Associations, 310 U. S. 534, 543, this Court said:

"There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the Legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning."

additional system. But there is no language in the opinion of the Court of Appeals for the District of Columbia Circuit on the subject and no holding supporting the S. E. C.'s view. The case is not authority, therefore, for the proposition. Nor is *Engineer's Public Service Company v. S. E. C.*, 138 F. (2d) 936 (C. A., D. C.) cited by the S. E. C. (brief, p. 42).

There is language in the majority opinion of the *Engineer's* case, *supra*, contrary to the S. E. C. position, and the Court held that the S. E. C. could not legally permit continued control of Virginia Gas by Virginia Electric, unless it could be found from the evidence that, "such continuing strength would not entail a sacrifice upon the part of the controlling utility".[10]

The court below reviewed the S. E. C.'s interpretation, that the losses should relate only to the additional system, and said (R. 140):

> "Neither the legislative history, if we are to consider that, nor the one court decision, relied on by the respondent, discussed this precise point. We cannot permit our conclusion as to the correct construction of the Act to be overborne by discussion by another court of other features of the Act from

[10] The Court of Appeals for the District of Columbia circuit said in the Engineer's case (138 F. (2d) 936, 944) that, "It is our belief that the Commission could not legally 'permit' the continued control of 'Virginia Gas' by 'Virginia Electric' unless it could be found from the evidence adduced at the hearing: (a) That there would be a continuing substantial strength, enjoyed by the controlled company which it would not have under its own control. (b) That there would be in the situation no reasonable expectation that a compensating strength would not be enjoyed by reason of its own control. (c) That such continuing strength would not entail a sacrifice upon the part of the controlling utility."

which a contrary construction can at most only be inferred. This is too important a part of the section to be interpreted by such method. Furthermore, while we recognize the merit of respondent's contention that the interpretation placed on a law by the agency enforcing it is persuasive, no one will contend that it is not, after all, the duty of the courts to construe the acts of Congress, even if such construction differs with long accepted administrative policy."

"LOSS OF SUBSTANTIAL ECONOMIES" IS A RELATIVE AND ELASTIC TERM.

The court below also discussed the meaning of "substantial economies" and held (R. 141, 142):

"There remains the question as to what is meant by the language 'substantial economies.' The Commission contends that economies are not substantial unless their loss 'would cause a serious economic impairment of the system' such as 'to render it incapable of independent economical operation.' It cites Engineers Public Service Co. v. S. E. C. (D. C. Cir.), 138 F. (2d) 936, and Philadelphia Co. v. S. E. C. (D. C. Cir.), 177 F. (2d) 720, as supporting this proposition. We think neither case accepts the contention of the Securities and Exchange Commission that the words 'substantial economies' must be so construed. The Engineers Public Service Co. case says 'substantial economies must mean, as was said in North American Company v. S. E. C. (2nd Cir.), 133 F. (2d) 148, 152 "important economies".' To be sure there was a dissent in

which Judge Soper, who wrote the opinion, favored a reversal of the order of the Securities and Exchange Commission because he thought the undisputed facts constituted a showing of 'substantial economies'. The majority merely felt that the evidence was not conclusive, and therefore declined to reverse the finding of the Commission. There was no specific holding by the court that the Commission's formula as to what was meant by 'substantial economies' was universally applicable. Much the same is true of the later decision in the Philadelphia Company case. There the court affirmed an order of the Securities and Exchange Commission, in which its limiting formula had been applied. The court there said ' "substantial" is a relative and elastic term.' In the context of the particular case, the court then said: 'We cannot find the Commission's understanding of the term "substantial economies" is wrong.'

"We are convinced that the formula proposed by the Commission is not one that is to be inflexibly used in the application of Clause A of the saving section. We think as has been said by the Court of Appeals for the Second Circuit in North American Company v. S. E. C. (2nd Cir.), 133 F. (2d) 148, 152, and as stated in the Engineers Public Service Company case, supra, that the term 'substantial economies' means important economies. The question of their importance must, of course, be determined by the bearing they have on the ability of the two systems to continue in the serving of the two commodities in general demand without

substantial change in policy, serving practically in the same way, making substantially the same gains, suffering substantially the same losses."

The *Philadelphia Co.* case, 177 F. (2d) 720 (C. A., D. C.) was decided solely on the basis of the facts presented, and the Court held that it, "could not review or reweigh the evidence beyond determining that the finding does or does not appear to be unreasonable" (page 724). At page 725, the Court of Appeals for the District of Columbia said that, "Even if the Commission had set up an erroneously high standard of proof, no prejudice would have resulted, for the Commission did not think petitioner's case proved by any standard, however low."

This Court will look in vain in the *Engineer's* case, 138 F. (2d) 936 (C. A., D. C.) for language to support the S. E. C. view that the losses described in the subsection must cause a serious economic impairment of the system, such as to render it incapable of independent economical operation. There is no conflict between the District of Columbia Circuit and the Fifth Circuit on this question of law, as we have pointed out. Taken at its best, the language in the *Philadelphia* case, *supra*, is *dictum*, because the Court there pointed out (page 725, footnote 23) that the S. E. C. did not think that petitioner's case had been proved or that the evidence and facts supported petitioner's claims, but fell far short of establishing that substantial economies would be lost on segregation. It found that the principal witness' studies were entitled to little or no weight. Thus the case was decided on its particular facts, which vary from the facts in the present case.

The S. E. C. orders in the present case are based therefore, on erroneous legal interpretations. In its earlier order of March 20, 1953, the S. E. C. held, "For the loss of economies to be 'substantial' they must be 'important' in the sense that they are of such magnitude as to cause a serious economic impairment of the system." (R. 117). In its September 13, 1955 order in this case, the S. E. C. said, (R. 132), "We there pointed out that under Section 11 (b) (1) Louisiana Power could retain its gas operations only if they were so small that they could not operate economically under separate management, and we found that it was clear that the Louisiana Power's gas properties are capable of effective and economical operation as a separate entity."

The test which the S. E. C. has imposed in this case for Section 11 (b) (1) (A) compliance, that the "loss of substantial economies" must be such a loss that would cause such serious economic impairment to the systems involved as to prevent their efficient operation under separate ownership, must fall; it has no support in the statute itself. A more reasonable construction is that which is placed on the Act by the court below, *i. e.*, that the term "substantial" is a relative and elastic term; that it means important economies, and the question of importance must be determined by the bearing they have on the ability of the two systems to continue in the serving of the two commodities in general demand without substantial change in policy, serving practically in the same way, making substantially the same gains, suffering substantially the same losses.

CONCLUSION.

The points of law involved here have not heretofore been directly passed on by this Court. The opinion of the

Court below considered all the issues which are now before this Court for ultimate determination. It is on belief that the lower Court's views are supported by logic and reason, as well as by those legal authorities which are available. The principal objectives of the Public Utility Holding Company Act of 1935 already have largely been accomplished. Here a State Commission, responsible to its citizens who are consumers and rate-payers, seeks to prevent an undesirable result which it feels is wholly unnecessary under the circumstances. The Louisiana Commission is attempting to prevent a loss of nearly a million dollars annually to the rate-payers of Louisiana Power. The separation of the electric and gas utility systems has not yet occurred. The S. E. C. order to do so is based on erroneous legal interpretations. This Court can correct the errors which have been committed, and can stop the execution of the "death sentence" before it is carried out. We urge it to do so by giving full effect to the provisions of the Act and by remanding this cause to the S. E. C. for further hearing.

The opinion of the court below is correct. It should be affirmed and this cause remanded to the S. E. C. for further proceedings, consistent with the opinion.

Respectfully submitted,

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